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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ERIC J. COOK, Defendant and Appellant.	A148655 (City & County of San Francisco Super. Ct. No. 225441)

Eric Cook was convicted by a jury of second degree burglary, receiving stolen property, and possessing burglary tools. Cook contends the trial court erroneously modified the standard jury instruction on aiding and abetting burglary, and that the error was prejudicial. He also asserts the prosecutor committed prejudicial misconduct in closing argument and that a condition of his mandatory supervision that prohibits him from possessing burglary tools and spark plugs is unconstitutionally vague and overbroad. We modify the supervision condition to add a scienter requirement, and otherwise affirm the judgment.

BACKGROUND

On January 27, 2016, Guelda and her young son Jeremy picked up her brothers, Glen and Wesley, at the airport. On their way home, the family stopped for dinner at a food truck court in San Francisco.[1] The brothers left their belongings in the back of Guelda's Jeep, which was parked across the street. As they were eating, Guelda and Glen

[1] We will refer to the victims by only their first names out of consideration for their privacy and anonymity.

saw someone looking into Guelda's car. Glen saw a white male later identified as Cook leaning over to look into the Jeep's rear driver's side window and another man sitting on a motorcycle or moped[2] near the driver's side door or hood, within an arm's length of Cook. Wesley saw the silhouettes of two individuals lurking around the Jeep, one on either side.

Wesley and Glen ran toward the car. As Glen crossed the street he saw the motorcyclist look at Cook. Glen could not hear anything, but he thought the man alerted Cook "because as soon as I started running over there, he looked back." It was clear to Glen that the man on the motorcycle was involved in whatever Cook was doing. Cook tossed Glen's backpack to the man on the motorcycle and the man sped away. Cook got on a bicycle with another backpack, belonging to Jeremy, and took off down the sidewalk.

As Glen and Wesley gave chase, a plainclothes police officer knocked Cook off the bike and apprehended him. The Jeep's driver's side quarter panel window and rear passenger's side window had been broken. Jeremy's backpack was in the rear passenger seat before the break-in.

San Francisco Police Sergeants Brent Dittmer and Matt Sullivan were patrolling in an unmarked vehicle when they observed Cook near the front of the Jeep conversing with a man straddling a motorcycle parked in front of it. Cook handed something to the man, moved behind the Jeep on the sidewalk side and crouched down "like he was trying to conceal himself behind it." His behavior was consistent with someone who had just committed or was preparing to commit an auto burglary. Sergeant Sullivan tackled Cook as he rode away on the bicycle.

A broken spark plug attached to a cord and a small flashlight were found nearby. Burglars commonly carry flashlights to look into parked cars and use spark plugs and spark plug chips, often attached to lanyards, to break car windows.

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[2] The witnesses variably described the vehicle as a motorcycle, scooter or moped. We will refer to it as a motorcycle for simplicity.

Cook gave a statement to the police that night. He said he did not know the man on the motorcycle. He was sitting on a wall contemplating whether to burglarize the Jeep when the motorcyclist "came up and he obviously already had seen it, right, knew about it or whatever." Both of them looked inside the car "and then hit it." As Cook explained it, "it was . . . like a battle" or "[c]ompetition almost" to see which of them would burglarize the Jeep "[a]nd we ended up both doing it. You know?" Cook admitted he "hit" the driver's side window with a spark plug and took Jeremy's backpack from the Jeep. The other man "hit" the passenger's side window and took Glen's backpack.

The prosecutor argued that Cook was guilty of burglary either as a direct perpetrator or as an accomplice. "So a person can be guilty two ways. They can either commit the crime themselves. They actually do it. In this case, we have Mr. Cook saying I smashed the driver's side window, and I took a bag. He says that. You heard him, his own voice, saying he did that. But he also passed a bag to somebody, the person on the motorcycle. [Glen] Alan testified to it. Sergeant Dittmer saw it, him pass something, and Sergeant Sullivan saw a black and white bag, consistent with the bag [Glen] described . . . , and he saw Mr. Cook give it to the guy on the motorcycle. [¶] If you believe that, if you find that to be true, then Mr. Cook aided and abetted the person on the motorcycle. He is just as guilty for what the person on the motorcycle did as he is for the things that he did." The defense argued the eyewitness testimony was contradictory and unreliable, and that Cook lied when he confessed to breaking into the Jeep to avoid being a "snitch."

The jury convicted Cook of second degree burglary of a vehicle, receiving stolen property, and possession of burglary tools. Cook was sentenced to 18 months in county jail and 18 months of mandatory supervision. Over a defense objection, he was ordered as a condition of mandatory supervision not to possess any "burglary tools such as a spark plug and any other tools[ ]as determined by" the probation department. His appeal is timely.

DISCUSSION

I. Instructional Error

Background

Cook contends the trial court erroneously modified the standard instruction on accomplice liability for burglary. The court instructed the jury under a modified version of CALCRIM No. 1702, "To be guilty of burglary as an aider and abettor, the defendant must have known of the perpetrator's unlawful purpose and must have formed the intent to aid, facilitate, promote, instigate, or encourage the commission of the burglary before the perpetrator finally left the scene."

Analysis

The crime of burglary is committed when a person "enters any . . . vehicle . . . when the doors are locked . . . with [the] intent to commit grand or petit larceny or any felony . . . ." (Pen. Code, § 459.)[3] As explained in *People v. Montoya* (1994) 7 Cal.4th 1027, 1050–1051, "a person who, with the requisite knowledge and intent, aids the perpetrator, may be found liable on a theory of aiding and abetting if he or she formed the intent to commit, encourage, or facilitate the commission of a burglary prior to the time the perpetrator finally departed from the structure." A person who aids and abets a burglary is a principal in the crime and shares the actual perpetrator's guilt. (§ 31; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

In accord with *Montoya, supra*, CALCRIM No. 1702 states that a burglary defendant may be held liable as an aider and abettor only if he or she knew of the perpetrator's unlawful purpose and formed the intent to assist in the crime "before the perpetrator finally left the structure." Here the trial court modified this instruction by substituting the word "scene" in place of "structure." The People acknowledge that the substitution erroneously permitted the jurors to convict if they found that Cook formed the requisite intent to assist the perpetrator after the perpetrator had "left" the vehicle, i.e.,

[3] Further statutory citations are to the Penal Code.

after he withdrew property from the Jeep, but before he left "the scene" of the crime.[4] We agree, but the error was harmless.

An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the harmless error standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Lamas* (2007) 42 Cal.4th 516, 526.) Where such an error relieved the jury of the obligation to make a finding on an element of the offense—here, that Cook harbored the requisite intent before the perpetrator withdrew from the Jeep—"we may review the entire record to determine whether it is clear beyond a reasonable doubt that a rational jury would have made the necessary findings . . . ." (*People v. Concha* (2010) 182 Cal.App.4th 1072, 1088–1089 [rejecting assertion that harmless error under *Chun*, *supra*, must be demonstrated by other aspects of the verdict].) The harmless error inquiry is, essentially, " '[i]s it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' " (*People v. Gonzalez* (2012) 54 Cal.4th 643, 663.)

It is. Glen, Sergeant Dittmer and Sergeant Sullivan each saw Cook talking with the motorcyclist by the Jeep as the crime was unfolding. Cook *admitted* to police that he intended to burglarize the Jeep, that he broke a window with a spark plug, and that he took a bag from the back seat. A flashlight and a piece of spark plug on a lanyard were found nearby. The stolen bag was in Cook's possession when he was apprehended trying to ride away. On the other hand, defense counsel's argument that Cook falsely confessed to avoid being a snitch was unsupported by any evidence, and as the prosecutor argued, the theory made no sense in light of Cook's statement to police that the other man also burglarized the Jeep. In sum, overwhelming and uncontradicted evidence of Cook's guilt as a direct perpetrator eliminates any reasonable likelihood that he merely decided to

[4] The parties agree that the instruction could properly be modified by replacing the word "structure" with "vehicle." It seems awkward and confusing to describe the perpetrator of a smash and grab auto burglary as having "left" the vehicle, but such a modification would have been legally correct.

assist the perpetrator after the burglary was completed or that the verdict would have been different but for the erroneous instruction. On this record, the instructional error was harmless beyond a reasonable doubt.

II. Prosecutorial Misconduct

Background

Cook contends the prosecutor committed prejudicial misconduct in his closing argument when he addressed accomplice liability. Specifically, he identifies the following italicized portions of the prosecutor's argument as improper:

"*If you believe [Cook passed a bag to the motorcyclist], if you find that to be true, then Mr. Cook aided and abetted the person on the motorcycle. He is just as guilty for what the person on the motorcycle did as he is for the things that he did*. And we'll come to it when we go through the evidence, but it's important. [¶] And then they're just the general principles behind the aiding and abetting. The perpetrator would have to commit the crime. Mr. Cook would know or would need to know that the perpetrator intended to commit the crime, and that's in his recorded statement. He admits that the person on the motorcycle was also looking to break into the vehicle. [¶] Now, before or during the commission of the crime, he intended to aid and abet the perpetrator. . . ." (Italics added.)

Addressing inconsistencies in the various witnesses' testimony about the burglary, the prosecutor argued:

"Now, Mr. Cook's statement, he says he smashed the driver's side, and he took the black bag he got caught with which was Jeremy's bag. So they're switched. Now [Guelda] saw Mr. Cook looking through the windows. They saw the person on the motorcycle. I believe it was [Glen] only saw the person on the motorcycle, saw his bag being handed. There was also testimony that at one point the person was off of the motorcycle, but now here's the question: What does that matter? What does it matter? [¶] *If the person on the motorcycle smashed both the windows, took items out, got on his motorcycle, and then Mr. Cook handed him the bag. Mr. Cook under the aiding and abetting theory is just as guilty as if he had smashed the windows himself.*"

Analysis

Cook forfeited this challenge to the prosecutor's comments by failing to object to them in the trial court. "To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury. [Citation.] As we explained in the analogous situation of a civil case in which it was alleged that one attorney made prejudicial comments in closing argument: 'The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.' [Citation.] Failure to make a specific and timely objection and request that the jury be admonished forfeits the issue for appeal unless such an objection would have been futile." (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

Cook argues an objection would have been futile because "it would make little sense for the trial court to sustain an objection when the prosecutor advanced an argument that was in accord with the improperly modified instruction." But Cook also failed to object to the instruction, and nothing in the record indicates the court would not have corrected the instructional error or duly considered a related defense objection to the prosecutor's argument.

Cook asserts defense counsel's failure to object was ineffective assistance, but we disagree. "To establish constitutionally inadequate representation, a defendant must demonstrate that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel's representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 845.) "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a

reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient." (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *Strickland v. Washington* (1984) 466 U.S. 668, 697.)

Considering the prosecutor's comments in the fuller context of his argument (see *People v. Cole* (2004) 33 Cal.4th 1158, 1203), there was no misconduct. The prosecutor made clear that aiding and abetting liability required Cook's advance knowledge of the motorcyclist's intent to burglarize the Jeep—knowledge that was established by Cook's admission to the police and the testimony from witnesses who saw him looking into the windows and speaking with the other man immediately before, if not during, the burglary. "Representation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.) Moreover, there is no possibility that the challenged remarks led to an unjust verdict. As noted above, Cook's guilt as a direct perpetrator was established by overwhelming evidence, including his own confession. On this record there is no possibility the verdict would have been different had defense counsel objected even if there were some merit to the claim of misconduct.[5]

III. Mandatory Supervision Condition

The defense objected when the trial court imposed a mandatory supervision condition prohibiting Cook from having "obvious burglary tools in your possession, such as spark plugs. Okay. Understanding there are other tools. I mean, you know, we could make a laundry list, but the spark plugs are what seem to be your tool of choice, so I'm going to highlight that and any others that the probation department may—that are not going to be a utility for you. [¶] I'm going to leave that up to them, all right, but I think the spark plugs, if you have any in your possession, that would be considered a violation of your mandatory supervision." The clerk's written abstract of the sentencing order reflects that the condition forbids "possession of burglary tools such as a spark plug and

[5] To be clear, we do not so conclude.

any other tools[ ]as determined by" the probation department. There is no indication in the record that the probation department ever notified Cook of specific prohibited items.[6]

Cook asserts this condition is unconstitutionally vague because the identity of items that constitute burglary tools is neither specified nor obvious. "The vagueness doctrine bars enforcement of ' "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." ' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) The People implicitly concede the point, but assert the defect is remedied by reference to the statutory definition of burglary tools (§ 466) and because "[t]o the extent the probation officer identifies any additional items constituting burglary tools, he or she will provide notice" to Cook.[7] We disagree. Although section 466 specifies a variety of tools that may readily be recognized as burglary tools, the list also includes common tools such as screwdrivers, which cannot, as well as an open-ended reference to "other instrument[s] or tool[s] . . . ." Most importantly, section 466 criminalizes the possession of such tools only if the possessor has the "intent feloniously to break or enter into" a building, vehicle or other structure. The condition imposed on Cook does not fairly

[6] Cook seems to concede that there would be no vagueness problem if the court had clearly instructed the probation department to notify Cook of prohibited burglary tools.

[7] Pursuant to section 466, "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code, or who shall knowingly make or alter, or shall attempt to make or alter, any key or other instrument named above so that the same will fit or open the lock of a building, railroad car, aircraft, vessel, trailer coach, or vehicle as defined in the Vehicle Code, without being requested to do so by some person having the right to open the same, or who shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor."

advise him what he may not possess because it is not limited to tools that he knows or intends are to be used to facilitate a burglary.

Cook suggests the remedy is to modify the condition to include a requirement that he "not possess any items . . . [he] know[s] the Probation Department considers to be burglary tools . . . ." Here too, we disagree. The goal of the condition is to prohibit Cook from possessing items he intends to use as burglary tools. Accordingly, modifying the condition to prohibit him from possessing any tools or other instruments that he knows are to be used or that he intends to use as burglary tools will better facilitate that goal and avoid vagueness concerns. (See, e.g., *In re R.P.* (2009) 176 Cal.App.4th 562, 570 [probation condition prohibiting weapon possession applies to an item not specifically designed as a weapon only if the probationer intends to use the item as a weapon]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 629 [modifying condition prohibiting defendant from associating with gang members to require knowledge that a person is a gang member].)

The same scienter principle dispenses with Cook's contention that prohibiting him from possessing spark plugs impinges on his constitutional right to travel by exposing him to arrest any time he "[enters] into any vehicle with an internal combustion engine." The condition imposed by the court prohibits Cook from possessing spark plugs *for use as burglary tools*, not in their ordinary use as a component of a gasoline combustion engine. So, simply riding in or possessing an automobile or operating a lawn mower would not violate his supervision condition. Cook also complains the condition is overbroad because it prevents him from possessing spark plugs "for the purpose of repairing his vehicle." Such a limitation cannot plausibly be seen as impinging on his right to travel. "Burdens placed on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such as toll roads, do not constitute a violation of that right . . . ." (*Miller v. Reed* (9th Cir. 1999) 176 F.3d 1202, 1204–1205 [denial of right to drive did not unconstitutionally impede right to interstate travel].)

DISPOSITION

The condition of mandatory supervision prohibiting possession of burglary tools is modified to prohibit Cook from possessing items that he knows are to be used or that he intends to use as burglary tools. In all other respects, and subject to that modification, the judgment is affirmed.

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Siggins, P.J.

We concur:

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Jenkins, J.

_____
Fujisaki, J.